



# UTAH'S WATER

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PROTECTING SOVEREIGN STATE'S RIGHTS  
& PRIVATE PROPERTY

# WATER DEVELOPMENT COMMISSION

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Randy N. Parker

Utah Farm Bureau Federation



# “GRANTING WATER TO THE STATES”

## History of Congressional Actions

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Act of July, 1866 – “Recognizes priority of possession”

Desert Land Act of 1877- “All surplus water free for appropriation”

Taylor Grazing Act of 1934 – “Act shall not diminish possession”

McCarran Amendment of 1952- State are Supreme! “Act waives U.S. sovereign immunity”

FLPMA of 1976 – “All actions by the Secretary are subject to valid existing rights”



# CONGRESSIONAL INQUIRIES

## “Western Water Rights”

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### United States House of Representatives

April 25, 2013 – Natural Resources Subcommittee on Water & Power

*“Federal Impediments to **Water Rights**, Job Creation & Recreation”*

October 10, 2013 – Natural Resources Subcommittee on Water & Power

H.R. 3189 sponsored by Representative Scott Tipton (R-CO) “The **Water Rights Protection Act**”

June 24, 2014 – Natural Resources Subcommittee on Water & Power

*“New Federal Schemes to Soak up Water Authority: Impacts on States, **Water Users** & Jobs”*

August 6, 2015 – Oversight Subcommittee on Interior

*“Threats to Grazing (Access & **Livestock Water Rights**) from Federal Regulatory Overreach”*

May 18, 2017 – Natural Resources Subcommittee on Water, Power & Oceans

Discussion Draft – **Water Rights Protection Act of 2017** sponsored by Representative Scott Tipton



# President Donald J. Trump

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April 25, 2017

## Presidential Executive Order:

**“Promoting Agriculture and Rural Prosperity in America”**

**Section 4 (ix)** ensure that water users' private property rights are not encumbered when they attempt to secure permits to operate on public lands;



# FEDERAL “DEFACTO” Water Rights



## FEDERAL ACTIONS – CONTROLLING STATE WATER:

**Cuts** to Historic Livestock Grazing Rights

**Closing** RS 2477 Access Roads

**Ownership Challenges** – Diligence Claims, Over-filing & Protests

## UTAH:

- More than **4 million (74%)** Livestock Grazing AUMs have been Cut or Suspended by the Forest Service & BLM.
- More than **16,000** Diligence Claims have been filed.





# United States Forest Service

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**“WATER CLAUSE, OVER-FILING & DILIGENCE CLAIMS”**

# Gifford Pinchot

## First Chief of the US Forest Service

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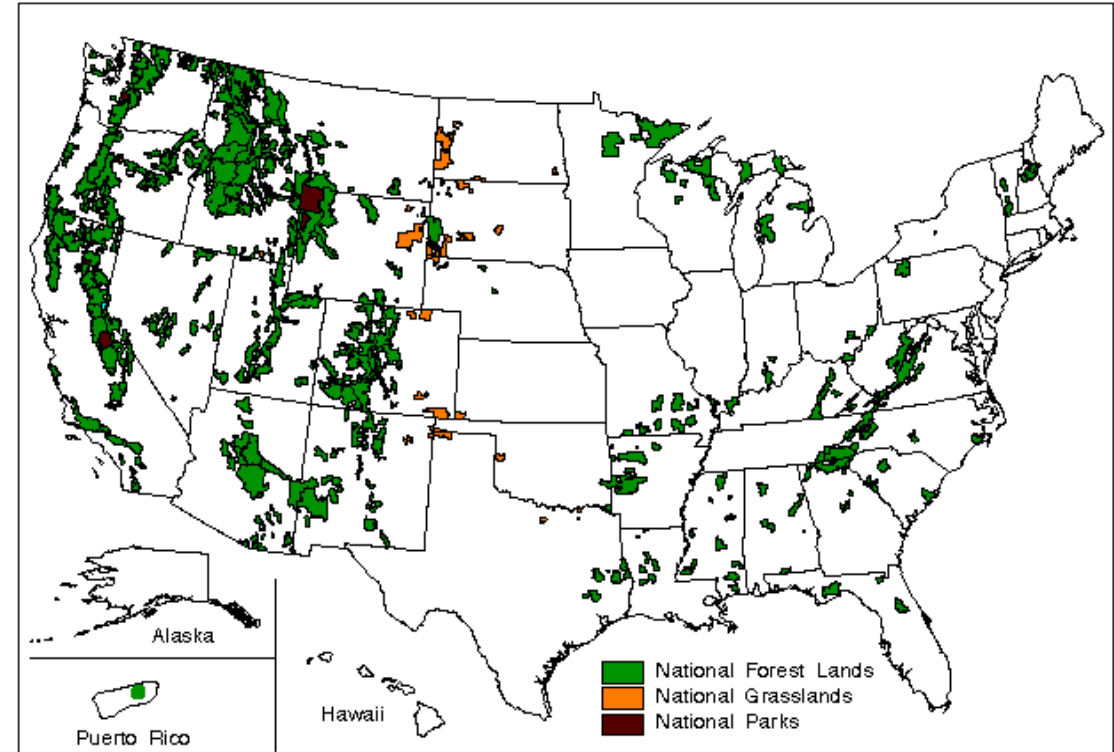
1907

“The creation of the National Forest has **no effect** whatever on the laws which govern the appropriation of **water**. **This matter is governed entirely by State and Territorial law.**”





## Forest System Lands



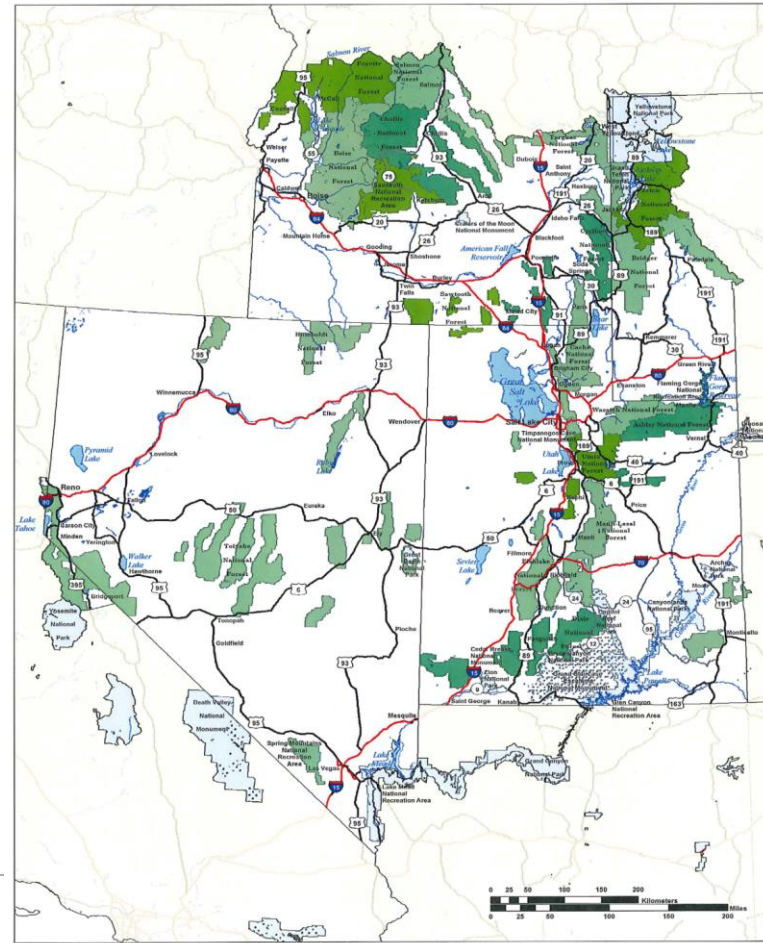
ACCORDING TO CHIEF TOM TIDWELL THE U.S. FOREST SERVICE CONTROLS:

- 14% OF UNITED STATES WATER SUPPLY
- 50% OF WESTERN UNITED STATES WATER SUPPLY



## Intermountain Region

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- MORE THAN 75% OF UTAH'S AVAILABLE WATER SUPPLY

# Harv Forsgren Intermountain Region Forester



“It is Forest Service policy to claim water rights for water used by permittees, contractors and other authorized users of the National Forest System...”

“The Forest Service believes water resources used to water permitted livestock are integral to the land, therefore the United States should hold the water rights for current and future permitted grazing.”



## June 2004 – “Water Clause”

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“ any right to divert water from permitted NFS land where the use of water is on the same permitted NFS land shall be applied for and held in the name of the United States and the holder (hereinafter called “joint water rights”)

In the event of revocation of this permit, the United States shall succeed to sole ownership of such joint water rights.”

# Utah “Diligence Claims”

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## US FOREST SERVICE:

- Filed more than 16,000 diligence claims on livestock water rights.
- Awaiting adjudication by the Utah State Engineer.

## Regional Forester Harv Forsgren in 2012 testimony before Congress:

**\*\*“these diligence claims are made on behalf of the United States, which was the owner of the land where livestock grazed prior to statehood and livestock watering took place which action established the federal government’s claim to water rights.”**



# Intermountain Region Guidance

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Intermountain Region Guidance / August 2008:

*“The Intermountain Region **will not invest** in livestock water improvements, **nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water right is held solely by the livestock owner.**”*

# 2012 - Tooele County Grazing Association

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## US FOREST SERVICE

- “Change of Use” Applications – Authorizing FS to determine where livestock water would be available.

### IF YOU DON'T:

- Non-compliance could “adversely affect turn-out.”





# 2016 - Wayne County

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US Forest Service filed a “SUBBASIN CLAIM” to Consolidate Diligence Claims:

- 204 Individual Water Rights
- 114.5 acre feet of water
- 8,114 Equivalent Livestock Units (ELUs)!





# BLM Water Rights Policy

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7250 - Water Rights

3/19/1984

**#4**     **Acquire and/or Perfect Water Rights** - Acquire and perfect the water rights necessary to carry out public land management purposes through state law and administrative claims procedures unless a federal reserved water right is otherwise available....

# Utah Legislature 2008 & 2014

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## UTAH LIVESTOCK WATER RIGHTS ACT - CODIFIED IDAHO'S JOYCE DECISION:

Livestock Water Rights Act as Amended Provides:

Clearly defines a beneficial user as the livestock permittee

Livestock water rights of the beneficial user are appurtenant to the allotment.

Deletes reference to "Certificate of Joint Ownership."

Unused or abandoned livestock water rights on the public domain shall be held by the State of **Utah** until they are awarded to a livestock operation.



# BLM

## EMPLOYEE POWERPOINT PRESENTATION

response to  
Utah Senate Bill 274

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“UTAH LIVESTOCK WATER RIGHTS ACT”

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# Effects of senate bill 274

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- Took effect May 13, 2014
- No affect on existing BLM rights, except for changes
- No affect on BLM rights for other uses such as fire, wild horses, recreation, wildlife.
- The **permittee consent** required for changes to BLM water rights doesn't create a **permittee interest in right**.

# Applies to only a very small portion of water rights

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SB 274 **does not apply to diligence claims**, which confirm historic pre-statutory waters (pre-1903 surface water rights and pre-1935 groundwater rights)

HB 274 does not apply to water user claims in adjudications, if claim is based upon use established prior to May 12, 2009



# BLM must have a water right before funding and authorizing Water developments

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1. BLM Utah **will not provide funding** for new developments that are not supported by a BLM water right.
2. BLM Utah **will not authorize Cooperative Range Improvement Projects** that are not supported by a BLM water right.



# Options for obtaining a water right

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1. Change application on BLM right in another location
2. Change application on BLM right that doesn't include livestock use
3. Acquire a water right in a land tenure adjustment, then change to livestock use
4. File an application for another beneficial use of the development: wildlife, wild horses, recreation, etc.



# Other actions necessary to implement instruction memorandum 2015-19

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Regular and careful review of applications filed by third parties.

- Each FO should have designated person review notices on a weekly basis.

**Protest any individual permittee applications for livestock rights on public lands.**

- Permittees may not be aware of new law or new BLM policy.
- Permittees may make incorrect land ownership statements.



# Why do we protest private applications?

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BLM seeks to hold water rights for grazing allotments **into perpetuity.**  
If water rights are in private hands, BLM can't guarantee water availability for future permittees.

Privately held water rights create an **administrative headache** if permit is transferred in the future.

**Permittees may attempt to use privately owned water rights to get leverage in allotment management decisions.**

# Other actions necessary to implement instruction memorandum 2015-19

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Notify USO hydrologist and range lead when:

- your office files a change application or new application for a complementary use (wildlife, recreation, etc.)
- you observe an application filed by a permittee
- do not expend funds on a range improvement project prior to receiving approval of the water right application or change of use application

# WHERE'S THE LINE?

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# CONSTITUTIONAL PROTECTION

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## United States Constitution

Protects citizens against:

“government taking of private property without just compensation and due process”

## Utah Constitution

Protects citizens against:

“government taking of private property or diminishment of value without just compensation and due process”



# CASE LAW

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# United States Supreme Court

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United States vs. New Mexico (1978) - SCOTUS ruled on the so-called United States Forest Service “implied-reservation-of- water” doctrine.

*Non-reserved water and water rights, such as for stock watering, are intended “to be allocated among private appropriators under state law.”*

# United States Supreme Court

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*Tarrant Regional Water District vs. Hermann* (2013) - SCOTUS concurred with Congress on the matter of water and the sovereign rights of the states:

*“The power to control public uses of water is an essential attribute of [state] authority.”*

# Joyce Cattle Co. vs. United States (2007)

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## Idaho Supreme Court (2007) - Opinion No. 23 Defined “Beneficial Use”

*“The District Court held that such conduct did not constitute application of the water to beneficial use under the constitutional method of appropriation, and denied the claimed rights. The Idaho Supreme Court concurred holding that **because the United States did not actually apply the water to a beneficial use** the District Court did not err in denying its claimed water rights.”*





# “THE WATER RIGHTS PROTECTION ACT”

Sponsor: Scott Tipton (R-CO)

113<sup>th</sup> Congress

114<sup>th</sup> Congress

-Prohibits “Water Clause” and imposing “Joint Ownership” of water rights as a **condition of permitted activity.**

# 115<sup>th</sup> United States Congress

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**H.R. 2939 “Water Rights Protection Act of 2017” - PASSED**

**(Rep. Scott Tipton)**, Underscores State’s Sovereign Water Rights.



May 18, 2017 - House Subcommittee on Water, Power & Oceans

# DILIGENCE CLAIMS

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**73-5-13 Claim to surface or underground water not otherwise represented**

**OPTIONS:**

- Exclude the Federal Government from holding water rights in Utah.

# DILIGENCE CLAIMS

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## OPTIONS:

- Exclude the Federal Government from holding water rights in Utah.
- Define the Federal Government out of current claims of diligence predating Utah Statehood.

# DILIGENCE CLAIMS

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## OPTIONS:

- Exclude the Federal Government from holding water rights in Utah.
- Define the Federal Government out of current claims of diligence predating Utah Statehood.
- Narrowly define livestock water rights and beneficial use on public lands specifically to use by domestic cattle, domestic sheep, domestic goats, domestic horses, etc. –

# DILIGENCE CLAIMS

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**OPTIONS:**

- Exclude the Federal Government from holding water rights in Utah.
- Define the Federal Government out of claims of diligence predating Utah Statehood.

**RECOMMENDATION:**

- Narrowly define livestock water rights and beneficial use on public lands specifically for domestic cattle, domestic sheep, domestic goats, domestic horses, etc.

# SCOTUS

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Chief Justice Roberts on Shared Government:

***'The States are separate and independent sovereigns.  
Sometimes they have to act like it.'***



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***Thank you***

